NEW JERSEY EMPLOYERS' LIABILITY AND WORKMEN'S COMPENSATION LAW

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In discussing this subject of "Employers' Liability and Workmen's Compensation," I will not attempt to review the past nor to indicate the steps by which this important subject has been brought so prominently before the American people. The evils of the old system are generally recognized and admitted by intelligent employers. That public opinion has been thoroughly aroused is evident from the fact that in ten states commissions have been appointed by the governors or legislatures to study these questions and recommend legislation.

In April, 1910, Governor Fort, of New Jersey, acting under a joint resolution of the Legislature, appointed a commission to inquire into and recommend legislation on the subject of employers' liability. This commission, of which I had the honor to be president, was composed of two employers, two representatives of labor, and two legislators; one each from the House and the Senate.

In January of this year, the commission presented their report, accompanying it with a proposed bill on employers' liability and workmen's compensation. This bill passed in the Senate by a vote of sixteen to one, and on Monday of this week (April 3, 1911), passed in the house by the remarkable vote of fifty-four to nothing, and was signed by Governor Wilson on Tuesday, April 4.

New Jersey has thus given a notable lesson in non-partisan legislation. The commission was appointed by the Republican Governor, Fort. The commission's bill was passed by a Republican Senate by a vote of sixteen to one, and then by a Democratic House by a vote of fifty-four to nothing. Last, but not least, it was signed by that great representative of true democratic principles, Governor Wilson. I am by tradition a republican, but if the democratic party can produce and will sustain leaders such as Governor Wilson in New Jersey and Francis Lynde Stetson in New York, I can imagine no more inspiring career for the young

man ambitious to serve his country than to fall in behind and keep step with such men.

The bill is divided into three sections and may be briefly outlined as follows:

Section I

This section deals entirely with modifications of the present law. It retains the proviso that the negligence of the employer must be shown to have been the natural and proximate cause of the injury. This proviso was retained, not because the commission did not believe in compulsory compensation, but because the weight of legal opinion received in reply to inquiries, was against the constitutionality of any plan whereby an employer would be compelled to compensate an injured workman regardless of his (the employer's) fault or negligence. The wisdom of this conclusion has since been demonstrated by the recent decision of the New York courts, declaring the New York act in this respect to be unconstitutional, even in the hazardous trades.

The New Jersey elective scheme differs from that of New York in an essential feature, in that the election must be made at the time of hiring; whereas, in New York, it is made after the accident. As a result, I am informed that the New York law has been practically a dead letter, as the workmen have naturally elected to sue under common law rights. In New Jersey, if the workman at the time of hiring refuses to accept a compensation law which the legislature has declared to be equitable, the employer can refuse to hire him, and in doing so will no doubt be sustained by public opinion.

Section I, however, modifies the present law of employers' liability by entirely abrogating the two old defenses, usually known as "fellow servant" and "assumption of risk." It also modifies the law of "contributory negligence" by providing that the employer must prove that the negligence of the employee was "wilful." This term is defined in the bill as (1) "Deliberate act or deliberate failure to act, or, (2) such conduct as evidences reckless indifference to safety, or, (3) intoxication."

It will be observed that this section deals entirely with the liability of the employer, and, standing alone, strips the employer of those defenses which in the past have been of the greatest value

to him in defending suits at law. The members of the commission were unanimous in their opinion that, regardless of any other legislation, the above modifications in the present law should be made, for the following reasons:

1st.—The defense of "fellow servant." In the great majority of cases, the employee has no voice in the selection of his fellow servants, and the mere fact of having the same employer should not, *in itself,* release the employer from a liability which he would otherwise incur. The injustice of this rule may be illustrated thus: An accident occurs, due to the act of an employee, which results in the injury of a fellow employee, and also of an outsider in no way connected with the work. The outsider may, and often does, secure redress, while the employee is barred solely on account of his being a fellow servant.

2d.—The defense of "assumption of risk." While theoretically, a workman may be presumed to have a choice in the selection of his employment, and to have carefully weighed the risks naturally inherent therein before going to work, as a matter of fact, in the vast majority of cases the choice is narrowed down to the acceptance of such risks or no work.

In this connection, the objection has been made by some employers that, for extra hazardous work, extra wages are paid. An instance was cited where riveters in a shop were paid $3.00 per day, while men doing the same work in the erection of high steel buildings were paid $6.00. The commission's view of this objection was that in the case of the workman on the high building, he was placing his life and limbs in jeopardy every minute of the day, and this should be a sufficient offset to the extra wage without asking him to throw into the scale also the future welfare of those naturally dependent on him.

3d.—The defense of "contributory negligence." The commission recognized the fact that this defense is founded on principles of justice. As the law now stands, however, any degree of negligence on the part of the employee was sufficient to bar his action, even though the employer was also guilty of negligence. In order to prevent injustice by the non-suiting of an injured employee on a mere technicality, i. e., where his negligence is relatively trivial, the commission incorporated in their proposed bill a provision that the employer must prove "wilful negligence" on the part of the employee.

In suggesting these modifications in the present law, the commission intended primarily to abolish these obsolete defenses because of their inherent injustice. Incidentally, however, the removal of these defenses leaves the employer in a less tenable position in ordinary suits at law, and he will therefore naturally be more willing to assent to the provisions of Section II.

Section II

This section contains an elective system of workmen's compensation and is made as nearly as possible automatic and universal by providing that every contract of hiring, express or implied, shall be presumed to have been made with reference to the provisions of this section, unless either party has notified the other in writing of his intention to continue under his common and statute law rights, as expressed in Section I. Then follows the schedule of compensation, which may be briefly summarized as follows:

For temporary disability—50 per cent of wages. For disability total and permanent—50 per cent of wages for 400 weeks. For disability partial and permanent—A schedule of definite injuries has been prepared covering as nearly as practicable the most common and obvious forms of injury. The compensation is half wages, ranging from five weeks for the loss of one joint of a toe, up to two hundred (200) weeks for an arm. For death, the compensation is based on the number and relationship of actual dependents, but is distributed, in case of no will, in accordance with the intestate laws of the state. The maximum in all cases, including death, is $10.00 per week for 300 weeks, except in case of total permanent disability, when payment is extended to 400 weeks. This bill applies to all employments, including domestic service, the only exception being "casual employments."

Section III

This section deals principally with definitions, but aside from these has one paragraph to which the commission attaches great importance, i. e., a proviso that Sections I and II are declared to be inseparable, and if any essential part of either section be declared unconstitutional, so that the whole of such section must fall, the other section must fall with it and not stand alone. In framing this clause, the commission had in mind the situation which exists to-day

in Ohio, where a law has been passed which simply removes the employer's present defenses. Laboring under this handicap, the Ohio employers are now striving to influence pending legislation, which will provide for workmen's compensation, but, of course, they cannot hope to wield as much influence as before the defenses were abrogated.

The New Jersey Commission, while unanimously of the opinion that the two defenses of "fellow servant" and "assumption of risk" should be entirely abrogated, and that of "contributory negligence" materially modified, have tried to deal with the whole subject in a practical and businesslike manner, by incorporating in the same bill the removal of these defenses and the schedule of compensation. Their aim has been, not to strip the employer of his defenses without giving him a harbor of refuge, and by the proviso mentioned, these two ideas are made to stand or fall together.

The one weak point in most of the legislation proposed in the various states, including New Jersey, is the fact that, in the last analysis, the payment of the compensation, even after the amount has been agreed upon, is dependent on the continued solvency of the employer. This condition will probably be met, partially, at least, by legislation permitting the transfer of the liability to the company insuring the employer, providing that such company is approved by the State Commissioner of Insurance.

The commission confidently expects that the elective section of the act will be generally accepted by both employers and employees, for the following reasons:

By the Employer: 1st—Because his liability is limited, and he is thus relieved of the danger of harassing lawsuits for excessive damages.

2d—By reason of the abrogation of two defenses and modification of another, the position of the employer who refuses to accept the elective law will be less tenable.

3d—Because he can in a large measure add the expense to cost of manufacture and recover it in his selling price.

4th—Because he can readily insure his liability.

By the Employee: 1st—The practical certainty of settlement in accordance with the schedule, as against the uncertainty of an appeal to common law rights.

2d—Promptness in settlement, as against the "law's delay."

3d—All the money is paid to the injured person, as against the heavy attorney's fees and court expenses of the suit at law.

In the various hearings on the proposed bill, the one feature which has impressed me most has been the evident fear on the part of the small manufacturer, or employer, that the bill will impose unusual burdens on him. It seems to me that the answer to this is that he can protect himself by insurance. That the cost of insurance under existing systems is excessive, I believe to be true, but that is not the worst feature. Heretofore, the aim of the employer has been to seek by insurance to minimize the outlay, and the welfare of the injured, or his dependents, has not been a factor in the problem. The present system simply shifts the fight against the injured employee from the employer to the insurance company, which throws the whole force of its trained legal organization and its financial resources, against the inexperienced, ignorant, or otherwise helpless injured employee. In fact, the whole aim of the insurance company has been to use every legal device to avoid payments to victims of accidents.

That they have been fairly successful in attaining this object would seem to be indicated by the report of the New York Commission, which shows from statistics of nine companies that on an average only 36.34 per cent of that which employers pay in premiums is paid in settlements of claims and suits. This is clearly a great economic waste.

The remedy lies in the organization of one or more mutual accident insurance companies, conducted along the same lines as have been so conspicuously successful in the factory mutual fire insurance companies, which have been operating for the past sixty years in New England. The first purpose of these companies has been to prevent fires. They not only advise their members just what must be done to prevent fires by methods of construction and maintenance, but they go further and refuse to admit to membership any factory which will not conform to their high standards.

The result has been a reduction in the cost of fire insurance from $2.50 per $100.00 to 7.17 cents, which latter figure is the average yearly cost for the past thirteen years. The adoption of this system will fully protect the small employer, and will at the same time attack the problem at the right end by reducing the number of accidents, which, after all, is the great desideratum. I

venture the opinion, with all due respect to our friends the insurance men, that in the near future it will be repugnant to an aroused and enlightened social conscience, that the insurance of injured workmen should be a source of profit to any one.

Imitation is the sincerest form of flattery. I have here a draft of an act which, within the past week, has been presented to the Pennsylvania legislature by men affiliated with the labor interests of your state. This act is practically a duplicate of the New Jersey one; the only changes being minor ones to make it conform to the local conditions.

This New Jersey bill is probably the most advanced legislation on this subject in this country. Personally, however, I am convinced, from my study of the subject, that even this bill, while a distinct advance, does not provide a permanent solution of the problems involved. This, in my judgment must come through a system of state insurance, which shall be compulsory, both on the employer and the employee. Before such a plan can be adopted in this country, it would seem that the federal and state constitutions must be amended.